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## HENG CHOON LEE & ANOR v. WONG CHOON HO

HIGH COURT MALAYA, IPOH
MOHD RADZI HARUN JC
[ORIGINATING SUMMONS NO: AA-24F-21-04-2018]
8 FEBRUARY 2019

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***CIVIL PROCEDURE:*** *Action – Abuse of process – Application for declaration as to paternity of child followed by subsequent separate application for child to undergo DNA tests on paternity – Subsequent application thereof – Whether if allowed would prejudge earlier application for declaration – Whether could embarrass court – Whether an abuse of process – Whether ought to be dismissed*

C

***CIVIL PROCEDURE:*** *Jurisdiction – Inherent jurisdiction of court – Rules of Court 2012, O. 92 r. 4 – Whether only procedural rule – Whether not intended to alter substantive rights*

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By encl. 1 filed in 2018, the plaintiffs applied for a declaration that the first plaintiff was the biological father of a four-year-old child ('WJY'), and for him to be granted guardianship and custody of WJY. It was undisputed that WJY was born out of an illicit relationship between the first plaintiff and one CY, and that, upon CY's death, guardianship and custody of WJY was

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granted by a court order to the defendant. Be that as it may, whilst encl. 1 was pending, the plaintiffs filed encl. 9 herein and applied for DNA samples to be taken from WJY for the purpose of confirming the first plaintiff's status as the biological father of WJY. Before the Judicial Commissioner, the plaintiffs contended that the taking of WJY's DNA samples would serve

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WJY's best interests as well as assist the court in disposing encl. 1. It was further contended that encl. 1 would be withdrawn, if encl. 9 were allowed and DNA results showed the first plaintiff was not WJY's biological father. The defendant objected to encl. 9 on the ground that it contravened her legal rights as WJY's court appointed guardian. The issue that arose was whether, on the facts and upon the law on the taking of DNA samples, the application

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in encl. 9 ought to be granted, or dismissed.

**Held (dismissing application):**

**(1)** The court would not be restricted to allow the application in encl. 9 if it was appropriate to do so, bearing in mind WJY's interest as the

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paramount consideration. The court, however, has an inherent jurisdiction to dismiss or stay or otherwise nullify all actions or proceedings which are shown to be vexatious or oppressive or constitute an abuse of process. (paras 18 & 22)

**(2)** It was objectionable that the plaintiffs had deemed it fit to manipulate

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a court process through encl. 9 for the direct benefit of their pending substantive application in encl. 1. Enclosure 9, having been filed after

encl. 1, could embarrass the court because, if the application was allowed, whatever outcome of the DNA tests would prejudge encl. 1. It would have been different if encl. 9 had been filed first in sequence. For that would mean that if the application was allowed, the outcome of the DNA tests could only be filed as part of the supporting document for consideration of the court in determining encl. 1. On this ground alone, encl. 9 ought to be dismissed. (paras 20 & 22)

**(3)** The inherent jurisdiction under O. 92 r. 4 of the Rules of Court 2012 is a procedural rule. It is not intended to alter substantive rights. The application pertaining to the taking of one's DNA samples is a substantive application affecting one's substantive rights, more so, when, as here, it involves the DNA samples of a child. Hence, O. 92 r. 4 is inapplicable to an application such as encl. 9's. The court could not exercise its inherent power for such purpose. (paras 26, 27 & 47)

**(4)** The taking of WJY's DNA samples would not be in the best interest of WJY as claimed as, at such a tender age, WJY would not be able comprehend the purpose of the taking of such samples or understand its consequences, reach and meaning. (para 38)

***Obiter:***

**(1)** As there is a *lacunae* in Malaysian law dealing with the taking of DNA samples for purposes of determining the biological parent of a child, the relevant authorities should conduct a study to determine the appropriateness of promulgating such laws. The relevant legislations in jurisdictions such as the UK and Ireland could be taken and used as a guide. (para 45)

**Case(s) referred to:**

*Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru [1995] 4 CLJ 339 HC* ***(refd)***
*Chip Chong Sawmill Co Sdn Bhd & Ors v. Chai Khiun Fui [1978] 1 LNS 28 FC* ***(refd)***
*H & A Children [2002] EWCA Civ 383* ***(refd)***
*Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor [2008] 1 CLJ 651 CA* ***(refd)***
*Johnson v. Gore Wood & Co (A Firm) [2002] 2 AC 1* ***(refd)***
*Lee Lai Cheng (Suing As The Next Friend Of Lim Chee Zheng And Herself) v. Lim Hooi Teik [2017] 6 CLJ 668 HC* ***(refd)***
*Lee Lai Ching v. Lim Hooi Teik [2013] 4 CLJ 107 HC* ***(refd)***
*Manson v. Vooght [1999] BPIR 376 CA* ***(refd)***
*Pacific Centre Sdn Bhd v. United Engineers (M) Bhd [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 HC* ***(refd)***
*Peter James Binsted v. Jevencia Autor Partosa [2000] 2 CLJ 906 HC* ***(refd)***
*Re D (Paternity) [2006] EWHC 3545 (Fam)* ***(refd)***
*Tan Beng Sooi v. Penolong Kanan Pendaftar (United Merchant Finance Bhd, Intervener) [1995] 2 CLJ 846 HC* ***(refd)***

**Legislation referred to:**
Federal Constitution, art. 8
Penal Code, s. 323
Rules of Court 2012, O. 14A, O. 92 r. 4

*For the plaintiffs - CS Ong & Lydia Wong; M/s Siong & Rita*
*For the defendant - KY Chong & Chong Hui Yean; M/s HL Lee & Co*

*Reported by Wan Sharif Ahmad*

## JUDGMENT

**Mohd Radzi Harun JC:**

### Application

**[1]** The plaintiffs filed a notice of application as in encl. 9 for this court to grant an order to allow DNA sample to be taken from a four year old child, WJY, to enable that DNA sample to undergo DNA tests for the purpose of determination and confirmation of the status of the first plaintiff as the biological father of WJY.

**[2]** Upon hearing the submission of the learned counsels for both parties, and having considered the affidavits, facts and the law, this court dismissed the application with costs.

**[3]** The plaintiffs now appeal against my decision and I shall provide the grounds of my judgment as below.

### Facts

**[4]** The first plaintiff and the second plaintiff are husband and wife, married since 1994.

**[5]** During the subsistence of the said marriage between the first and second plaintiffs, the first plaintiff had an extra-marital affair with Wong Choon Yee ("CY"). That affair went on for a period of about 20 years.

**[6]** As a result of that extra-marital affair, WJY, a boy, was born on 3 September 2014.

**[7]** CY is the younger sister of the second plaintiff and the defendant.

**[8]** CY died on 14 February 2016.

**[9]** *Vide* CY's will dated 6 February 2016 (see exh. WCH2 to the affidavit of Wong Choon Ho affirmed on 27 June 2018) the defendant was appointed by CY as guardian to WJY.

**[10]** *Vide* an order of the Ipoh High Court dated 6 March 2017 (see exh. HCL4 to the affidavit of Heng Choon Lee affirmed on 26 April 2018), the defendant was granted the right of custody, control and care over WJY.

**[11]** *Vide* an originating summons as in encl. 1 filed on 28 April 2018, the plaintiffs are seeking from this court that: A

(i) the first plaintiff shall be declared as the biological father of WJY;

(ii) the first plaintiff is granted the guardianship over WJY;

(iii) the plaintiffs to be granted custody, care and control over WJY, or alternatively to be granted with right of access to WJY as specifically pleaded in para. 5 of the OS; B

(iv) the defendant is granted with reasonable right of access to WJY.

**[12]** Before the hearing of encl. 1, the plaintiffs filed the current encl. 9. C

**Finding**

*Rape*

**[13]** Wong Lan Hin, the father to the second plaintiff, the defendant and the deceased CY, in his affidavit affirmed on 27 June 2018 averred that her daughter CY informed him that she was raped by the first plaintiff. D

**[14]** No further action was taken against the first plaintiff on this matter simply for the fact that the first plaintiff is the husband to the second plaintiff, who is CY's sister and Wong Lan Hin's another daughter.

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**[15]** The first plaintiff in his affidavit affirmed on 13 July 2018 denied the allegation of rape as averred by Wong Lan Hin and maintained that he had a long-standing extra-marital affair with CY and that their sexual relations had been consensual.

**[16]** This court ruled that the issue of rape is preposterous, to say the least. The incident, if ever happened, would be regarded as rape only if the first plaintiff had been charged and found guilty, convicted and sentenced by a court of law for that offence. CY, the alleged rape victim, has died almost three years ago. This issue should never have been raised. In actual fact, it had only succeeded in creating some form of negative aspersions on the very person making the allegation. F G

*Court Estopped From Granting Any Other Orders When A Custody Order Is In Force?*

**[17]** The defendant contended in her affidavit affirmed on 6 August 2018 that the plaintiff's application cannot be allowed by this court as it would contravene her legal rights by virtue of this court's order of 6 March 2017 which granted her the custody, care and control over WJY. The defendant appears to have the impression that as the person with the right to custody, only she, and no one else, not even a court, could decide on anything pertaining to WJY. The right to custody would include her right to determine whether or not to allow the DNA specimens to be taken from WJY. H I

**[18]** It is the finding of this court that the defendant's argument is wrong. Although the defendant has been granted with the custody, care and control over WJY, it does not restrict this court to allow this application, if it deems fit and appropriate to do so, on such terms and conditions it so ordered, and taking into consideration the interest of the child as the paramount consideration.

*DNA Result Would Determine Fate Of Plaintiffs' Application*

**[19]** Paragraphs 4, 5, 6 and 7 of the affidavit deposed by Heng Choon Lee, the first plaintiff, and affirmed on 13 June 2018, in support of the plaintiffs' application averred that the main purpose of this application is to provide proof that the first plaintiff is the biological father of WJY. This would in turn assist this court in determining the plaintiff's application in encl. 1 for the first plaintiff to be declared as the biological father of WJY. The said DNA result would also facilitate subsequent registration process of the first plaintiff as the biological father of WJY at the National Registration Department. Counsel for the plaintiffs had also argued that if this application is allowed and the DNA results show that the first plaintiff is not the biological father of WJY, the plaintiffs would withdraw their application in encl. 1.

**[20]** This court found it objectionable that the plaintiffs deemed it fit to manipulate a court process through this application for the direct benefit of their pending substantive application. Had this application been filed first in sequence preceding the application in encl. 1, it would have reflected a different picture altogether to this court. For if it had been so, then on the assumption that this court allows this application, whatever result or outcome of the DNA tests could be filed as part of the supporting document for consideration of the court in determining the application in encl. 1. But as this application is filed after the filing of the application in encl. 1, this application could embarrass the court. This is because if this application is allowed, whatever result or outcome of the DNA tests would certainly prejudge encl. 1, particularly the plaintiffs' prayer for the declaration of the first plaintiff as the biological father of WJY.

**[21]** The Court of Appeal in *Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor* [2008] 1 CLJ 651; [2008] 2 MLJ 11 decided that the categories of abuse of process of court are never closed and will certainly proliferate due to the myriad circumstances available from the factual background found in each particular case. This proposition found its root in the House of Lord decision of *Johnson v. Gore Wood & Co (A Firm)* [2002] 2 AC 1, when Lord Bingham of Cornhill referred to *Manson v. Vooght* [1999] BPIR 376 CA 388-389, where May LJ lamented, *inter alia*, that "Abuse of process is a concept that defies precise definition in the abstract". The ground propounded by the plaintiffs as stated above falls squarely and perfectly within this realm.

**[22]** This court ruled that this particular ground supporting the plaintiffs' application could result in an embarrassment to this court as explained earlier. It tantamounts to an abuse of the court process as envisaged by the Court of Appeal in *Indah Desa Saujana Corp Sdn Bhd (supra).* On this ground alone, this court would dismiss this application in line with the decision in *Chip Chong Sawmill Co Sdn Bhd & Ors v. Chai Khiun Fui* [1978] 1 LNS 28; [1978] 2 MLJ 24 where the Federal Court held that the court has inherent jurisdiction to dismiss or stay or otherwise nullify all actions or proceedings which are shown to its satisfaction to be vexatious or oppressive or constitute an abuse of process.

*Order 92 r. 4 of the Rules of Court 2012*

**[23]** It is trite that currently there is no specific law in Malaysia to enable this court to grant the order as prayed by the plaintiffs to compel WJY to undergo DNA test to achieve the purpose as stated in the application. This is conceded by both parties to the application.

**[24]** The plaintiffs therefore are relying their application mainly on this court's inherent powers under O. 92 r. 4 of the Rules of Court 2012 ("ROC").

**[25]** The purpose and scope of O. 92 r. 4 of the ROC was aptly explained by Edgar Joseph Jr J (as he then was) in *Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319; [1984] 2 MLJ 143 where His Lordship said:

> ... the inherent jurisdiction of the court includes all the powers that are necessary to fulfil itself as a court of law; to uphold, protect and fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.

**[26]** The court will not apply its inherent powers under this order to all cases indiscriminately but is duty-bound to determine the issues in dispute so far as they affect the rights and interests of the parties: *Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru* [1995] 4 CLJ 339; [1995] 2 MLJ 287. In *Tan Beng Sooi v. Penolong Kanan Pendaftar (United Merchant Finance Berhad, intervener)* [1995] 2 CLJ 846; [1995] 2 MLJ 421, the court held that the inherent jurisdiction under O. 92 r. 4 is a procedural rule and is not intended to alter substantive rights.

**[27]** It is this court's finding that the law is trite that O. 92 r. 4 is inapplicable in an application such as in encl. 9. The application pertaining to the taking of one's DNA sample is a substantive application affecting one's substantive rights. It is not procedural in nature. More so when the application involves the taking of DNA sample from a four year old child, not purely for the benefit and interest of the child but as explained in the earlier paragraphs, with the intent of ensuring the success of the plaintiffs' substantive application in encl. 1. This court cannot exercise its inherent powers under O. 92 r. 4 of the ROC for such purpose.

*Decision Of Lee Lai Ching v. Lim Hooi Teik*

**[28]** The plaintiffs had relied heavily on the decision of the High Court in *Lee Lai Ching v. Lim Hooi Teik* [2013] 4 CLJ 107; [2013] MLJU 93 in support of its application. In that case, the plaintiff who is the natural mother of a child, LCZ, filed an action against the defendant to determine the defendant's paternity of the child. This action was taken after the plaintiff's failed attempts to get the defendant to acknowledge that LCZ was fathered by him. The defendant had also refused to undergo DNA test to determine paternity. The issue before Zamani J (as His Lordship then was) was whether the court could compel the defendant to undergo the DNA test. The defendant invoked a decision of KC Vohrah J in *Peter James Binsted v. Jevencia Autor Partosa* [2000] 2 CLJ 906 that the law does not allow for a person to be compelled to undergo a test to ascertain paternity when the DNA test involves the taking of specimen, as such taking of specimen without the person's consent amount to hurt under s. 323 of the Penal Code.

**[29]** Zamani J allowed the plaintiff's application when he construed that the order for DNA testing does not tantamount to hurt under s. 323 of the Penal Code because the *mens rea* is to determine paternity. Zamani J also applied the provision of the International Convention on the Rights of the Child, which is legally binding on Malaysia as Malaysia had acceded to it, and concluded that "it is in the best interest of the minor that the defendant be ordered to undergo DNA testing to determine the paternity of the minor".

**[30]** This court observed that the Court of Appeal had reversed Zamani J's decision, *albeit* mainly on the ground that Zamani J had erred in deciding the issue pursuant to O. 14A of the ROC when the existence of the alleged intimate relationship between the plaintiff and the defendant should be decided first through a full hearing instead of a summary trial. Zamani J's decision is thus no more good law.

**[31]** Even if this court were to apply the principle in *Lee Lai Ching (supra)*, it would be a misjudgement. Zamani J decided to compel a purported father to undergo DNA test, not the child as in this application before me currently. This distinguishing fact alone would make the decision of Zamani J inapplicable to this application.

**[32]** The case was retried, as ordered by the Court of Appeal. Lim Choong Fong JC (as he was then) in *Lee Lai Cheng (Suing As The Next Friend Of Lim Chee Zheng And Herself) v. Lim Hooi Teik* [2017] 6 CLJ 668; [2017] 10 MLJ 331 ("*2017 Lee Lai Ching*") dealt with some of the key issues as follows:

(i) whether court could utilise inherent jurisdiction or power under O. 92 r. 4 of the ROC to compel alleged father to undergo DNA test;

(ii) whether the Deoxyribonucleic Acid (DNA) Identification Act 2009 ("DNA Act") is applicable to civil proceedings and thus could compel the defendant to undergo DNA test;

(iii) whether art. 8 of the Federal Constitution extends to right of minor to know his/her true identity

**[33]** The court held that it did not have the power to order the defendant to undergo DNA testing whether through the taking of blood, intimate or non-intimate samples even where hurt would not be inflicted on to the person, based on the following grounds:

(i) It is plain that the DNA Act has no application to civil disputes.

(ii) Article 8 of the Constitution was irrelevant to the present dispute because it does not confer the right to pedigree, such as the right of the minor to know his or her true identity and to have possibility of contact with each natural parent.

(iii) The court's inherent jurisdiction and power is a limited one to prevent injustice or to prevent abuse of process of the court. Order 92 r. 4 of the Rules of Court 2012 is only defensive in nature to abate procedural injustice. In other words, the inherent power cannot be utilised to invoke or facilitate a substantive right, *albeit* unjustly denied.

**[34]** I agree and adopt the findings of His Lordship Lim Choong Fong in *2017 Lee Lai Ching* particularly on his findings pertaining to the non-existence of any specific legislation in Malaysia that could be used to compel the taking of DNA sample, the irrelevance of art. 8 of the Federal Constitution, and the non-application of O. 92 r. 4 of the ROC to this kind of application.

*An Unusual Approach Adopted By The UK Court*

**[35]** I was initially attracted to apply the method employed by Hedley J in the UK Family Division Court decision in *Re D (Paternity)* [2006] EWHC 3545 (Fam), [2007] FLR 26, and the decision of Thorpe LJ in the UK Court of Appeal decision of *H & A Children* [2002] EWCA Civ 383, as cited in the submissions of counsel for the plaintiffs. But I realised such application would be legally untenable in Malaysia at this juncture.

**[36]** Both cases were referring to specific provisions of the UK Family Law Reform Act 1969 and the Family Law Act 1969 respectively, which has specific provisions on the taking of bodily samples from persons below the age of 16 years, without that person's consent, with order of court, or if the court considers it would be in the best interest of that child to give such order. Apart from that, I found that Hedley J in *Re D (Paternity)* (*supra)* chose

to adopt what His Lordship termed as a "slightly unusual approach". His Lordship gave an order that the taking of sample for the minor is allowed but to be stayed without limit of time, and with liberty to restore. This stay, according to His Lordship, is to remove the pressure on the minor to undergo the DNA test at that material time. The DNA test should and could be done once that child chooses to do so, and the test would be carried out once the court determined that it is in his best interest to do so.

*It Is In WJY's Interest To Know The Identity Of His Biological Father At The Earliest Opportune*

**[37]** The first plaintiff, in para. 9 of his affidavit, affirmed on 13 July 2018 stated further that this court should allow this application as it would be in the interest of WJY to know the real identity of his biological father at the earliest possible opportunity and to be informed on the background of his parents at this young age. This would enable WJY to accept the facts and could avoid future negative effects should he come to know about it later.

**[38]** I agree with the argument of the plaintiffs only to the extent that it would be in the best interest of WJY to know for certain the real identity of his biological father. But assuming if this courts allow this application and the DNA sample is taken from WJY instantaneously, how does that serve the best interest of WJY? Firstly, at such tender age, WJY would not be able to comprehend the purpose of the taking of his DNA sample. Secondly, again at such tender age, whatever the outcome of the DNA results, WJY would not be in the position to understand its consequences, reach and meaning. This in itself defeats the plaintiffs' argument that this application would enable WJY to know his true parents (in this case his biological father) as early as possible.

**[39]** My hands are tied and I cannot adopt similar "unusual approach" as employed by Hedley J in *Re D (Paternity) (supra)* due to the reasons as I had explained earlier.

*Convention On The Rights Of The Child ("CRC")*

**[40]** As the CRC was mentioned by Zamani J in *Lee Lai Ching (supra)*, I intend to touch briefly on this important issue as it has direct relevance to this application.

**[41]** As a State Party to the CRC, the provisions of the CRC are legally binding on Malaysia, except for arts. 2, 7, 14, 28 para. 1(a) and 37, which Malaysia had entered its reservations.

**[42]** Articles 7 and 8 of the CRC are amongst the provisions that are directly relevant to the issue before this court. These two articles are reproduced as below:

Article 7:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity.

**[43]** In the context of WJY, art. 7, among others, guarantees WJY the right to know the identity of his biological father. Whereas art. 8 protects WJY's right to preserve his identity, including his nationality, name and family relations, without unlawful interference.

**[44]** Although Malaysia had placed its reservation on art. 7, International Law norms and practices dictate that the Government of Malaysia cannot continue to have policies and laws that run contrary to the intent, purpose and object of the CRC, including the reserved art. 7. The Government of Malaysia is legally obliged to adopt administrative and legislative measures to implement fully the provisions of the CRC to which Malaysia had not placed its reservations, including art. 8.

**[45]** As there is currently a lacunae in Malaysian law dealing with the taking of DNA samples for purposes of determination of the biological parent of a child, this court recognises the need for the relevant authorities in the Government of Malaysia to conduct a study to determine the appropriateness of promulgating such laws, if it had not done so. The relevant legislations in other jurisdictions, including the UK and Ireland, could be used as guides.

**[46]** Existence of such legislative mechanism would elevate Malaysia's compliance stature of the CRC. At the same time, application such as the one before this court now could be dealt with in a much definitive manner once such laws are in place.

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## Conclusion

**[47]** There is currently no legal provision in Malaysia that would enable this court to entertain applications such as the one before this court now. Order 92 r. 4 of the ROC is inapplicable for application such as the one in encl. 9. In the final analysis, it is not in the best interest of WJY for this court to allow this application.

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**[48]** Based on all of the above consideration, I dismissed the plaintiffs' application in encl. 9 with costs at RM2,000.

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